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No. 16-1454

In the Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD GRANT REVIEW *NOW* BECAUSE THE SECOND CIRCUIT RESOLVED AN IMPORTANT QUESTION IN A NOVEL, HARMFUL WAY 2

II. AMEX CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S CASES 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) 4, 5

Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) 2

Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) 7

Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992) 9

Fid. Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) 3

FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) 10, 11

FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) 2, 5, 11

In re Am. Express Anti-Steering Rules Antitrust Litig., No. 11-MD-2221 (E.D.N.Y.)..... 4

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223 (2d Cir. 2016)..... 4

Italian Colors Rest. v. Am. Express Travel Related Servs. Co., 667 F.3d 204 (2d Cir. 2012) 4

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401 (2015) 4

Leegin Creative Leather Prods., Inc. v. PSKS, 551 U.S. 877 (2007)..... 2, 6, 7, 8

NCAA v. Bd. of Regents of the Univ. of Okla., 463 U.S. 1311 (1983) 2

NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) 2, 5

Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) 4

Photos Etc. Corp. v. Home Depot U.S.A., Inc., 137 S. Ct. 1374 (2017) 4

State Oil Co. v. Khan, 522 U.S. 3 (1997) 8

Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015) 5

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953) 7, 10

United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377 (1956) 7

United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003) 4

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005) 4

Other Authorities

1 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (4th ed. 2013) 7

Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627 (2006) 5

Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (Supp. 2017) 8, 10, 12

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 3

This case concerns the anti-steering provisions that American Express ("Amex") imposes on its merchant customers. Amex's opposition does not dispute the district court's *factual* findings that these provisions (1) have raised the prices that the entire credit-card industry charges merchants, and (2) in turn, have raised the prices that merchants charge consumers. Pet. App. 207a-12a; Amex Br. 10 & n.1. Instead, this case presents a purely *legal* question: Do these horizontal pricing effects meet the Government's burden under the "rule of reason" to show anticompetitive harm, and shift to Amex the burden to prove procompetitive benefits? The district court found that they did, but the Second Circuit required the Government to prove more—that the price increases were not offset by "benefits to cardholders in the form of rewards and other services." Pet. App. 49a n.52.

The petition explained why the Court should grant review. *First*, the Court's guidance on the rule of reason is needed, and the decision below conflicts with the guidance that it has provided. *Second*, this case is important to the economy and the law. *Third*, the decision below conflicts with antitrust law's guiding light—enhancing consumer welfare. In response, while the United States calls review premature, it fully agrees that the decision below "seriously departed from sound antitrust principles," and that Amex's provisions will "thwart price competition in an important sector of the economy and inflate the retail prices paid by all consumers." U.S. Br. 9-10. Amex, by contrast, defends the decision below before calling for further percolation. Amex Br. 14-36. Neither rebuts the need for *immediate* review.

I. THE COURT SHOULD GRANT REVIEW *NOW* BECAUSE THE SECOND CIRCUIT RESOLVED AN IMPORTANT QUESTION IN A NOVEL, HARMFUL WAY

Amex and the United States request further percolation, highlighting the lack of a circuit split. The Court should grant review *now*, however, because: (1) this case is important to the economy and the law; (2) the Second Circuit's dominance in antitrust litigation involving the credit-card industry makes a specific split unlikely; (3) delay imposes real costs on consumers; and (4) the Second Circuit prematurely departed from this Court's traditional framework.

A. The Court often considers important antitrust issues without a conflict. It did not wait until another circuit confronted the NCAA's television plan for football games because of the issue's "major impact countrywide." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 463 U.S. 1311, 1313 (1983) (White, J., in chambers); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 88 (1984). It did not wait for another circuit to confront blanket licenses for copyrighted music "because of the importance of the issue[]." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 7 (1979). It obviously could not wait for a split to reconsider its rule against resale price maintenance. *Leegin Creative Leather Prods., Inc. v. PSKS*, 551 U.S. 877, 885 (2007). And it even reviewed a local agreement among Indiana dentists, not to resolve a split, but to clarify "applicable principles of antitrust law." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 453 (1986).

As the petition explained (at 25-30), this case should be no different. The decision below signifi-

cantly affects the economy. That is shown by the diverse *amici* group, ranging from Nobel prize-winning economists to distinguished antitrust professors, from a merchant association to a consumer group. Retailers "are united here in the view that Amex's anti-steering rules inflict significant harm to their business and to the national economy." Retail Litig. Ctr. Br. 2. A consumer group, too, notes that, without review, consumers "will collectively pay *billions of dollars* in inflated retail prices and unfair cross subsidies." U.S. Pub. Interest Research Grp. Br. 3; *cf. Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) (suggesting that financial stakes provided "strong factor in deciding whether to grant certiorari").

Even Amex concedes this case's *"economic* significance," but claims that the Court reviews only cases of "*legal* importance." Amex Br. 30. Yet "the importance of a case depends on how many other persons, apart from the actual litigants, will be affected by resolution (or nonresolution) of the questions presented." Stephen M. Shapiro et al., *Supreme Court Practice* 480 (10th ed. 2013). This case affects nearly every American.

Regardless, unlike the one-time settlement that Amex identifies (Amex Br. 29), the case also has *legal* importance. Antitrust Professors Br. 1-2. Any principles that the Court articulates about what a plaintiff must prove to establish anticompetitive harm would affect *every* rule-of-reason case. And, contrary to Amex's claim (Amex Br. 27), recent cases preferring that rule highlight the need for review. The Court's preference for the rule of reason has increased its importance, but the Court has bemoaned

that it "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). The Court should take this case to provide greater predictability, given "the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009).

Amex also wrongly calls this case "fact-bound." Amex Br. 26-27, 33. Not so. This case offers a great vehicle for clarifying generally applicable antitrust principles because of its clean record. As Amex concedes (Amex Br. 10 & n.1), the Second Circuit did not dispute any *factual* findings, so the case would not require the Court to delve into issues subject to clear-error review. The Court instead need only decide the *legal* effect of those findings.

B. Waiting for a split also could delay review *indefinitely*. As *amici* explain, antitrust suits challenging practices of the credit-card industry have converged in the Second Circuit because of multidistrict-litigation rules. Retail Litig. Ctr. Br. 21-23; Discover Br. 18-19. Decisions from those cases and others bear this out. *E.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016), *cert. denied Photos Etc. Corp. v. Home Depot U.S.A., Inc.*, 137 S. Ct. 1374 (2017); *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.*, 667 F.3d 204 (2d Cir. 2012), *rev'd Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); *cf. In re Am. Express Anti-Steering Rules Antitrust Litig.*, No. 11-MD-2221 (E.D.N.Y.). Arbitration agreements further limit the

ability of this Court to resolve antitrust issues against that industry. *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting). In many respects, then, Amex's request here is like asking the Court to wait for a circuit conflict before reviewing a patent case from the Federal Circuit. *Cf. Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836 (2015). But a regional circuit in New York should not have the final word on a practice that affects merchants and consumers from Utah to Rhode Island.

C. During that delay, Amex's provisions would permit inefficient cross-subsidies to permeate the economy, imposing real harm. As the petition noted (at 30-35), modern antitrust law seeks to enhance consumer welfare through allocative efficiency—i.e., "ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *Ind. Fed'n of Dentists*, 476 U.S. at 459. The anti-steering provisions impede that goal by barring merchants from signaling to cardholders the costs that different cards impose, making price unresponsive to "consumer preference." *NCAA*, 468 U.S. at 107. Retailers spread resulting higher costs to *all* consumers through higher retail prices. Pet. App. 210a-11a. Thus, Amex's "customers do not internalize the full cost of their payment choice," Pet. App. 195a, which "distort[s] competitive markets by steering consumers toward more costly and less efficient payment methods," Alan Frankel & Allan Shampine, *The Economic Effects of Interchange Fees*, 73 Antitrust L.J. 627, 672 (2006).

The costs from any delay could prove significant. "One study by the Federal Reserve Bank of Boston found that, 'on average, each cash buyer pays $149 to

card users and each card buyer receives $1,133 from cash users' in annual cross subsidies." U.S. Pub. Interest Research Grp. Br. 7 (citation omitted). This redistribution is regressive because lower-cost cash and debit customers "tend to have incomes or credit scores too low to qualify for rewards credit cards." Economists Br. 20.

Amex responds to this point in circular fashion in a footnote. It says that focusing on higher retail prices "'fails to take into account offsetting benefits to cardholders in the form of rewards and other services.'" Amex Br. 24 n.6 (quoting Pet. App. 49a n.52). But those rewards cannot *themselves* prove the lack of competitive harm. They are procompetitive only if they arise from Amex's efficiency, not from inefficient cross-subsidies. And the reason that Amex must use anti-steering provisions is to maintain the latter. Competition would lead cardholders to internalize the costs of their cards and decide whether the benefits exceed their *full* costs. That competition—"not Amex's obstruction" of it—should decide the optimal amount of cardholder rewards. Antitrust Professors Br. 19; Economists Br. 11.

Amex also claims that a concern with allocative efficiency represents a "guise" to apply quick-look standards to vertical restraints. Amex Br. 28-29. Not so. The rule of reason applies, so the Government used a seven-week trial to prove the *actual* effects of Amex's provisions on merchant fees. Indeed, Amex's reliance on this Court's vertical-restraint cases is ironic. These cases have recognized that vertical restrains can decrease *intrabrand* competition to increase interbrand competition. *Leegin*, 551 U.S. at 890. Here, however, Amex's restraints decrease

interbrand competition among credit-card networks. These cases have also recognized that vertical restraints can prohibit "free rides." *Id.* at 890-91. Here, however, Amex's restraints promote free rides by exacerbating cross-subsidies. In sum, this case warrants review whether one adheres to the Chicago School, the Harvard School, or a more Brandeisian view of antitrust. *Cf.* 1 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 112d (4th ed. 2013).

D. Lastly, Amex and the United States suggest that the Court should decline review because lower courts and economic literature have just begun debating "two-sided" platforms. Amex Br. 30-34; U.S. Br. 20-21. This has things backwards. For decades, the Court has used *one test* to define the market, asking whether another product is "reasonably interchangeable" with the product at issue. *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). It has done so even though two-sided platforms have been around for just as long. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 610 (1953). Indeed, many [illegible]gular markets can be recharacterized as "two-sided." Economists Br. 6-7.

The Second Circuit's decision to favor a "novel and unprecedented approach" over the traditional market-definition test provides a reason for review, not a shield against scrutiny. *Id.* at 9. Antitrust cases do "not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988). Instead, a change in law should be grounded in substantial experience showing that those standards do not fit business to-

day. *State Oil Co. v. Khan*, 522 U.S. 3, 20-22 (1997). *Leegin*, for example, overturned the ban on vertical price restraints only *after* decades of doctrinal developments. 551 U.S. at 889-904. Thus, any claim that a "different and new economic analysis is required in two-sided markets" should require "a rigorous and careful demonstration." Economists Br. 9. But the Second Circuit did not identify any consensus of scholarship and experience proving that an exception should exist to the traditional market-definition test for markets like the credit-card market. And because two-sided platforms have become more common, the decision below could "exempt[] [many] firms from effective antitrust scrutiny." Antitrust Professors Br. 22.

II. AMEX CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S CASES

The petition explained that the Second Circuit's decision conflicts with this Court's cases by (1) departing from the traditional test for defining the relevant market, and (2) imposing on the Government the requirement to *dis*prove procompetitive benefits. Pet. 18-25. The United States agrees that the Second Circuit made these errors, U.S. Br. 10-19, as does a leading treatise, Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 562e, 565, 1505 (Supp. 2017). Amex's opposition fails to reconcile the decision below with the Court's cases on both points.

A. *Market Definition.* As the petition noted (19-24), Amex's cardholder services are not in the same market as its merchant services because merchants could not simply become cardholders in response to increased merchant fees. In response, Amex con-

cedes the *fact* that its merchant services and cardholder offerings are not reasonably interchangeable. Amex Br. 16. It instead opts for a new *legal* test, contending that its services to cardholders and merchants—together—qualify as "*part of the same product*" because services to one are *useless* without services to the other. *Id.* That is analogous to saying that tires and brakes should be treated as part of the same product—in the same market for finished automobiles—because the two component parts are useless without the other (and many others).

Amex's argument conflicts with *Eastman Kodak Co. v. Image Technology Services*, 504 U.S. 451 (1992), which held that the *servicing* of Kodak photocopiers could qualify as a separate product in a separate market from the *replacement parts* for Kodak photocopiers. *Id.* at 462-63, 481-82. Amex responds that these services and parts were separate products because they could be "sold separately and at different times." Amex Br. 17. The same is true of Amex's services; it provides credit cards to (and contracts with) cardholders "separately and at different times" from its contracts with merchants. Indeed, Visa and Mastercard's distinct open-loop systems—with *separate* issuers and acquirers—show that entities can sell a "component" independent of the "final" credit-card transaction. Pet. App. 13a-14a. Despite allegedly selling the left shoe without the right (Amex Br. 16), issuers of Visa cards manage to stay in business. In short, as the district court noted, "each constituent product market in this industry is distinct, involving different sets of rivals and the sale of separate, though interrelated, products and services to separate groups of consumers." Pet. App. 119a.

Times-Picayune also recognized that "interdependent markets" should be treated separately under the antitrust laws. 345 U.S. at 610. Amex counters that the Court in that case "simply held that the defendant lacked market power over *advertising*." Amex Br. 17 (emphasis added). This statement admits that the Court analyzed one side of a two-sided platform (advertising) as a separate market from the other (readership). The Court did not ask whether the defendant had market power over the entire newspaper platform that brings together advertisers and readers. Amex next distinguishes credit cards from newspapers, noting that the former unites a cardholder and a merchant on a transaction-by-transaction basis whereas the latter unites readers and advertisers generally. *Id.* at 18. Amex fails to explain why this factual distinction concerning the degree of interdependence matters for the legal question about defining the relevant market. It should not. In both the newspaper and credit-card contexts, "*competition* should choose the optimal mix of revenue as between the two sides, an issue obfuscated by the [Second Circuit's] incorrect finding that these two elements of revenue were within the same antitrust market." Areeda & Hovenkamp, *supra* ¶ 562e.

B. *Burden Shifting.* As the petition noted (at 24-25), the decision below also conflicts with *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). The Second Circuit's market definition required the Government to prove *not only* that Amex's anti-steering provisions caused harm to price competition in the merchant side of the credit-card platform, *but also* that this harm was not "offset" by procompetitive benefits on the cardholder side. Yet *Actavis* identified the *de-*

fendant as the entity that must prove the "legitimate justifications" for a restraint. 133 S. Ct. at 2236.

In response, Amex makes an irrelevant point and a mistaken one. As for the irrelevant point, Amex notes that the petition did not challenge the Second Circuit's holding regarding the *indirect* method of proving anticompetitive harm—i.e., showing that the defendant has market power based on its market share (or other circumstantial evidence). Amex Br. 20-21. Here, however, the Government proved market power *directly* by showing actual anticompetitive effects (reduced price competition and higher prices). The district court found—and the Second Circuit did not deny—that Amex's provisions *increased* the prices that the *entire* credit-card industry charged merchants. Pet. App. 192a-93a, 207a-10a. "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the *potential* for genuine adverse effects on competition." *Ind. Fed'n of Dentists*, 476 U.S. at 460 (emphasis added). Such inquiries are unnecessary when a plaintiff proves "'*actual* detrimental effects.'" *Id.* at 460-61 (emphasis added and citation omitted).

As for the mistaken point, Amex argues that the Government failed to prove *actual* anticompetitive harm—so as to transfer the burden to Amex to offer legitimate justifications—because the Government's reliance on increased merchant prices did not consider the cardholder side of the platform, including cardholder rewards. Amex Br. 22-25. Yet, as the United States noted, the district court found that total "net" prices were higher even accounting for the rewards. U.S. Br. 18 n.4 (citing Pet. App. 209a). Regardless, this claim doubles down on Amex's mistak-

en market definition. Instead, the Government satisfied its "prima facie case" by showing the credit-card industry's reduced price competition for *merchants*. Areeda & Hovenkamp, *supra* ¶ 1505. Amex, "being the author of the restraints, is in a better position to explain why they are profitable and in consumers' best interests." *Id.* For the reasons noted above, *supra* Part I.C, Amex's conclusory reliance on rewards—without more—does not provide a legitimate justification for the restraint.

CONCLUSION

The petition for a writ of certiorari should be granted.

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